Filed 7/26/19 Kennedy v. Kennedy CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DRAKE KENNEDY, Plaintiff and Respondent, v. BRIAN KENNEDY, Defendant and Appellant; REGENCY OUTDOOR ADVERTISING, INC., et al., Nominal Defendants and Appellants.	B294398 (Los Angeles County Super. Ct. No. 18STCP02617)

APPEAL from an order of the Los Angeles County Superior Court, James C. Chalfant, Judge. Affirmed.

Sheppard, Mullin, Richter & Hampton, Joseph F. Coyne, Jr., Gregory P. Barbee, Laura A. Alexander; Karish & Bjorgum and Eric Bjorgum, for Defendant and Appellant.

O'Melveny & Myers, Daniel M. Petrocelli, Jonathan D. Hacker, Molly M. Lens and David L. Kirman for Plaintiff and Respondent.

Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, Mark T. Drooks, Paul S. Chan and Ray S. Seilie for Nominal Defendants and Appellants.

I. INTRODUCTION

Leo Tolstoy famously observed that every unhappy family is unhappy in its own way. The unhappiness of brothers Drake and Brian Kennedy, at least as far as this appeal is concerned, stems from the family billboard business they co-own.[1] After years of disagreement, culminating in contentious litigation, Drake and Brian resolved to settle their disputes. They agreed to sell the assets of the business expeditiously (subject to a minimum floor price), split the proceeds, wind up the corporate entities, and presumably then go their separate ways. Eighteen months later, Drake filed a new lawsuit seeking the appointment of a receiver, alleging Brian had improperly stymied execution of the settlement agreement's sale process.

The trial court granted the request for a receiver to complete the agreed upon sale process, finding compelling evidence Brian frustrated the parties' settlement agreement and breached the covenant of good faith and fair dealing. Brian now appeals that decision. We affirm, finding substantial evidence

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[1] For purposes of clarity and not out of any disrespect, we refer hereafter to the Kennedy brothers by their first names.

supports the trial court's factual findings, and no legal error in its decision to appoint a receiver.

II. FACTUAL BACKGROUND

A. The Business and the Initial Lawsuit

The sibling disagreements here are sadly so pervasive they begin with contesting who originally founded the business at issue. Both Drake and Brian assert they alone founded Regency Outdoor Advertising, Inc. (Regency) in 1973, and later asked the other to join him at the company. In any event, it is undisputed that Drake and Brian each own 50 percent of Regency and related companies Corona Outdoor Advertising, Inc., Westminster Outdoor, Inc., Virtual Media Group, Inc., and West Hollywood Properties LLC. Drake and Brian each own 40 percent of Skyline Outdoor Media, Inc., with the remaining 20 percent owned by an individual named David Seyde. We refer to these corporate entities collectively as the "Companies."

The brothers dispute how integral the other was to the growth and success of the business, but agree that in 2012 Drake suffered serious health related issues, and stepped away from any day-to-day role at the Companies. From that point forward, Brian was the lead executive managing the Companies, and responsible for directing other employees. Drake claimed that later in 2012, Brian transferred to himself one of the Companies' most lucrative billboards. This led Drake to sue Brian, Seyde, and at least some of the corporate entities, and Brian to countersue.

B. The Initial Lawsuit Is Settled Pursuant to a Binding Term Sheet

After several years of litigation, with the aid of the Honorable Dickran Tevrizian (Ret.) as a mediator, Drake, Brian and Seyde agreed to a binding term sheet (the Term Sheet) in April 2017 to settle the lawsuit. Despite being named defendants, no corporate entity was a signatory to the Term Sheet. All the Companies' shareholders (Drake, Brian, and Seyde), however, were signatories.

As part of the Term Sheet, Drake and Brian agreed to sell all assets of the Companies. The sale process was to commence forthwith, and a definitive agreement with the prospective buyer executed by August 31, 2017 "unless [Brian] and [Drake] jointly agree in writing to extend that date." The parties were to cooperate in good faith in the sales process, and to approve the best offer for the Companies' assets provided the offer was over a certain amount. Following the asset sale(s), the Companies were to be dissolved by mutual agreement. Any dispute regarding the terms and conditions of the Term Sheet was to be submitted to Judge Tevrizian for "binding resolution . . . ."

At the time of the Term Sheet, the Companies' boards of directors consisted solely of Drake and Brian, each with equal shares and voting power. The Term Sheet provided that if the parties were not able to reach a definitive sale document with a prospective buyer by August 31, 2017, Judge Tevrizian would be appointed as a third, and independent, director.

C. Brian Obstructs the Agreed Upon Sale Process

Despite his obligation to cooperate in good faith, Brian thereafter proceeded to obstruct and otherwise hobble the sale

process. Following execution of the Term Sheet, the Companies engaged investment bankers Moelis & Company LLC (Moelis) to assist in the asset sale. The Companies also retained an accounting firm, Macias Gini & O'Connell LLP (MGO), to assist with the preparation of financial information related to such a sale. Brian delayed signing the engagement letters for Moelis and MGO. When it was finally retained, MGO had difficulty preparing financial information for prospective buyers because management failed to provide MGO with necessary financial records. Substantial evidence indicated Brian directed throttling the flow of financial information. Moelis confirmed the sales process was hindered by the failure to provide timely financial information to prospective purchasers.

The Companies' assets were not sold by August 31, 2017 and Judge Tevrizian was subsequently appointed as a third director. Brian thereafter failed to comply (and made sure others in management similarly failed to comply) with appropriate board requests to furnish financial information to directors, shareholders, and outside accountants. While Brian alleges that Judge Tevrizian overstepped his board role and sought to manage the Companies' operations in lieu of Brian, Judge Tevrizian's actions were consistent with those of a diligent, engaged independent board member. For example, Judge Tevrizian requested financial data for 2017 and 2018. Management (i.e., Brian) never provided the requested information. Despite board direction to engage an outside accountant to provide remedial and forensic accounting support, management (Brian) failed to sign the engagement letter, failed to authorize payment, and failed to provide financial information to the outside accountant.

When MGO repeatedly raised concerns about the lack of information provided to it, Brian directed the Companies' controller to fire MGO. Brian terminated MGO without notifying the board or seeking its approval. When the board directed Brian to engage another accounting firm, Brian would not sign the engagement letter, delayed payment of the required retainer as well as invoices for work performed, and would not provide the accountants access to information despite warnings from company counsel about the serious challenges such inaction created to the sales process.

Brian's disregard of board directives and the provisions of the Term Sheet was not confined to the sale process. After Drake became ill in 2012, Brian removed Drake as a signatory on the Companies' bank accounts by falsely representing Brian was the Companies' sole owner. In July 2018, the board directed Brian to reinstate Drake as a signatory. Brian never complied. Brian also made an improper $3 million distribution from the Companies to himself. The Term Sheet provided Brian was to receive a specified yearly salary for running the Companies. Any further distributions were to be jointly agreed in writing, and equal as between Brian and Drake. In derogation of these Term Sheet provisions, Brian took out over $3 million from the Companies at the end of 2017 without notice to the board or to Drake individually, and without any corresponding distribution to Drake.

Brian offered explanations and rationalizations for all the above actions, which the trial court largely rejected. Given Brian's repeated refusal to respect the board's oversight role, Judge Tevrizian resigned as a director as of September 25, 2018. The resignation was "noisy," that is, accompanied by an

explanation of reasons set forth in the board minutes, including "(a) the refusal or inability of management to provide any financial statements as of and for the periods ended on December 31, 2017, March 30, 2018, and June 30, 2018; (b) the refusal or inability of management to provide or cause Company employees to provide access to the Company's books and records to accountants to verify tax returns and for other normal and customary financial reporting purposes; (c) the refusal of management to comply on a timely basis, or at all, with requests for information and instructions of the Board; and (d) the disrespect and lack of appreciation exhibited by senior management of the Company towards him." Once Judge Tevrizian resigned, the board was again deadlocked as its only remaining representatives were Drake and Brian.

D. Asset Sales to Date

Despite these various challenges, Moelis expended considerable effort to consummate a sale, including contacting over 30 potential buyers. In its view, the Companies were likely to realize greater value from selling assets in pieces rather than as a whole. Corporate counsel and Drake agreed. Moelis understood Brian also agreed; Brian now disputes that he did.

In 2018, the Companies managed to sell approximately 30 billboards along the Sunset Strip in Los Angeles to Netflix. Brian, Drake, and Seyde agreed in June 2018 to extend the required closing date for any sale transaction under the Term Sheet to December 31, 2018, and that Judge Tevrizian could

extend the date further "in his discretion."[2] The parties also agreed to adjust the minimum threshold sale price set forth in the Term Sheet.

In October 2018, a premier outdoor advertising agency submitted a letter of intent to buy substantially all of the Companies' remaining assets. Moelis and company counsel advised proceeding with the letter of intent. Drake and Seyde agreed, but Brian refused to cooperate. To the extent Brian provided comments on potential deal points, they were unreasonable and appeared designed to derail any transaction. Believing time was of the essence given the letter of intent, and that a receiver was necessary in light of Brian's actions thwarting the sale process, Drake sought court intervention to enforce the Term Sheet.

III. PROCEDURAL BACKGROUND

On October 22, 2018, Drake filed a complaint individually and derivatively on behalf of the Companies against Brian and naming the Companies as nominal defendants. Given Brian's actions, Drake moved ex parte for the appointment of a receiver to oversee the sale process, and to operate the Companies pending the sale. Drake contended a receiver was necessary because the Companies were the subject of deadlock and dysfunction, Brian had repeatedly violated the Term Sheet, and Brian had systematically excluded Drake from the Companies and was guilty of waste and mismanagement including

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[2] While other terms in the extension related to the Netflix deal, the term extending the asset sale consummation date was not restricted to the Netflix transaction.

misappropriating millions of dollars. The court granted the ex parte application in part, entering a temporary restraining order prohibiting Brian from paying himself anything until the receivership issue was resolved, and setting an order to show cause regarding the appointment of a receiver.

The order to show cause was heard on November 27, 2018. Prior to the hearing, both Drake and Brian filed extensive pleadings along with evidentiary support. The day before the hearing, the court provided a lengthy tentative written ruling appointing a receiver to enforce the Term Sheet's sale-related provisions, and denying the appointment of a receiver to run the day-to-day operations of the Companies (which were to remain Brian's responsibility). The court thereafter heard argument. When Brian raised a concern the trial court could not issue orders because the nominal defendants had not been served—an issue not raised in any briefing prior to hearing—the trial court permitted service upon Brian as a corporate officer and representative during the hearing. The court then adopted its tentative and set the matter for a further hearing regarding the particular individual to be appointed receiver.

On December 4, 2018, the court held a hearing at which William Howell was appointed as a limited receiver. On December 11, 2018, Brian timely appealed the order appointing a receiver, and we have jurisdiction over that appeal pursuant to Code of Civil Procedure sections 904.1, subdivisions (a)(6) and (a)(7).[3] The nominal defendants also filed a timely notice of appeal; they purport to join fully in Brian's arguments and do not

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[3] All statutory references are to the Code of Civil Procedure unless otherwise specified.

assert any separate arguments of their own. We granted Drake's motion for calendar preference in light of his advanced age and poor health.

On December 12, 2018, the nominal defendants moved ex parte for an order fixing the amount of the appeal bond. Finding Brian did not have a right to retain counsel for the nominal defendants to take a position adverse to the other 50 percent shareholder because "[t]he corporation is a neutral observer in the battle between the two shareholders," the court declined to entertain the application. The following day, the parties appeared on another ex parte application to fix the appeal bond amount, this time brought by Brian, upon which the trial court ruled.

IV. DISCUSSION

Brian argues three categories of alleged error require reversal of the order appointing a receiver. First, he argues the trial court abused its discretion by granting Drake relief beyond that provided by the Term Sheet, and by failing to utilize less onerous alternatives to a receiver. Second, Brian argues the manner in which the nominal defendants were served deprived both him and the nominal defendants of due process. Finally, Brian argues the trial court erred in overruling his objection to the entirety of Judge Tevrizian's declaration (the court instead admitted some portions and excluded others) and in considering certain evidence submitted with Drake's reply. We find no merit in any of these contentions.

A. The Trial Court Did Not Abuse Its Discretion in Appointing a Receiver

Section 564 gives a trial court authority to appoint a receiver, including in actions between individuals "jointly owning or interested in any property . . . where it is shown that the property . . . is in danger of being . . . materially injured" or in any case "where necessary to preserve the property or rights of any party." (§ 564, subds. (b)(1), (b)(9).) Generally, "the provisional remedy of receivership is utilized sparingly and only upon a compelling showing of need therefor." (*IFS Industries, Inc. v. Stephens* (1984) 159 Cal.App.3d 740, 756.) "[T]he availability of other remedies does not, in and of itself, preclude the use of a receivership. [Citation.] Rather, a trial court must consider the availability and efficacy of other remedies in determining whether to employ the extraordinary remedy of a receivership. [Citation.]" (*City and County of San Francisco v. Daley* (1993) 16 Cal.App.4th 734, 745; see also *Gold v. Gold* (2003) 114 Cal.App.4th 791, 807.)

An order appointing a receiver is reviewed for abuse of discretion. (*City of Crescent City v. Reddy* (2017) 9 Cal.App.5th 458, 466.) "An abuse of discretion is demonstrated if the court's decision was not supported by substantial evidence or the court applied an improper legal standard or otherwise based its determination on an error of law. [Citation.] 'As to factual issues, "we determine whether the record provides substantial evidence supporting the trial court's factual findings. [Citation.] Applying the substantial evidence test on appeal, we may not reweigh the evidence, but consider that evidence in the light most favorable to the trial court, indulging in every reasonable inference in favor of the trial court's findings and resolving all

conflicts in its favor. [Citations.] The question on appeal is whether the evidence reveals substantial support—contradicted or uncontradicted—for the trial court's conclusion[s] . . . . We uphold the trial court's findings unless they so lack evidentiary support that they are unreasonable." ' " (*Ibid.*)

The trial court found Brian frustrated the parties' agreement by obstructing the sale process, including that Brian directed the Companies' controller and others to slow play or otherwise impede access to financial information necessary to the sale process. That determination was supported by substantial evidence, including declarations from Drake, Seyde, and representatives of the accountants, investment bankers, and attorneys involved in the sale process. The evidence further showed the obstructive activity continued up through October 18, 2018 when an email showed the law firm representing Brian "has been unable to persuade its client . . . to provide access to the [Companies'] accounting books and records, and payment of past due invoices . . . notwithstanding that these conditions pose a serious challenge to processing a sale transaction." We therefore start by accepting the trial court's conclusion that Brian's objective was to run out the clock on the Term Sheet deadline, that he breached his duty of good faith and fair dealing by actively seeking to frustrate the sale process, and that he failed to comply with multiple directives from the board of directors.

Given this factual baseline, we reject the two challenges Brian raises to the court's exercise of its discretion. Brian first argues the trial court essentially rewrote the Term Sheet by allowing the receiver to enforce purported rights that either had expired prior to the court's order, or which are not set forth in the Term Sheet in the first place. Second, Brian argues the court

erred by failing to consider the availability of less onerous remedies.

1. The Court Did Not Rewrite the Term Sheet

Brian raises three claims the court erred in ordering relief beyond the terms contained in the Term Sheet. We discuss each in turn.

(a) The Purported Expiration of the Term Sheet

Brian claims the deadline for the asset sale contemplated by the Term Sheet expired as of December 31, 2018 unless it was further extended by the parties in writing, the parties never agreed in writing to extend the deadline, and the court therefore improperly extended that deadline unilaterally. Brian has waived this argument not only by failing to raise it before the trial court, but also by affirmatively urging the trial court grant the extension about which he now complains.

At the October 22, 2018 hearing on the ex parte, the court indicated it was considering extending the December 31, 2018 deadline. Prior to the November 27, 2018 hearing, the court issued a tentative ruling indicating the "receiver will not be limited by the December 31, 2018 deadline, which may be extended in the receiver's discretion." At the November 27, 2018 hearing, the court also orally indicated it would not require the receiver to sell the Companies' assets by December 31, 2018. At no point leading up to the November 27, 2018 hearing, nor at any point during that hearing, did Brian object to extending the deadline. Instead, Brian embraced that extension to argue there was no longer any exigency warranting the appointment of a

receiver.[4] Nor did Brian object during the process of finalizing the trial court's order. Instead, during discussion of the form of the proposed order, Brian joined in Drake's request that the trial court make clear the December 31, 2018 deadline was no longer operative. Having failed to object and further invited the very ruling of which he now complains, Brian has forfeited any appellate argument the trial court erred by authorizing an extension of the deadline. (*M.N. v. Morgan Hill Unified School Dist.* (2018) 20 Cal.App.5th 607, 632.) [5]

Brian claims he has not forfeited his deadline-related argument because it raises a purely legal issue on undisputed facts, namely that the Term Sheet required the parties' written agreement and there was no such agreement to extend. (E.g., *C9 Ventures v. SVC-West, L.P.* (2012) 202 Cal.App.4th 1483, 1492

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[4] The trial court rejected this argument, stating "I can't remove [the deadline] without appointing a receiver."

[5] Brian's related argument that he was denied due process because Drake's notice of motion did not specifically set forth a request to extend the December 31, 2018 contractual deadline is meritless. Drake's notice of motion was required to state the nature of the order being sought (Cal. Rules of Ct., rule 3.1110, subd. (a)), which did—Drake wanted a receiver appointed. The extension of the sale deadline was a collateral order made by the court to ensure the receivership order being sought did not result in a fire sale detrimental to both parties given the short time remaining before December 31, 2018. Brian was informed on October 22, 2018 the court was considering such an extension, thus providing him considerable notice and opportunity to be heard before the November 27, 2018 hearing, as well as afterwards when the parties and the court were finalizing the written order.

[rule that appellate court will not consider arguments made for first time on appeal does not apply "if the new argument raises a pure issue of law on undisputed facts"].) This ignores that Brian and Drake *did* agree in writing to extend the deadline when they submitted a joint written request to that effect to the trial court in connection with finalizing the form of the order.

Even if the objection somehow had been preserved, there is substantial evidence Brian interfered with timely performance of the parties' obligations under the Term Sheet. He is therefore equitably estopped from taking advantage of the delay he created. (*City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, 490 (*City of Hollister*).) In *City of Hollister*, the City's insurance policy required that to receive benefits under that policy, the City needed to contract for the repair of a damaged building within 180 days from the date of loss. (*Id.* at p. 462.) The insurer, however, "actively interfered with City's performance of the 180–day contracting condition, intentionally and in bad faith, by obstructing, delaying, and interfering with City's efforts to determine its rights under the policy." (*Id.* at p. 491.) Given this conduct, the insurer was equitably estopped from asserting the 180-day contracting condition as a bar to recovery. (*Id.* at pp. 498—500.) Even if one ignores Brian's acquiescence to an extension beyond December 31, 2018, he cannot frustrate performance under a contract with a deadline, and then take advantage of his improper delay by seeking to enforce that deadline. (*Ibid.*; see also Civ. Code, § 3517 ["No one can take advantage of his own wrong."].)[6]

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[6] Brian's argument that a delay beyond December 31, 2018 without an increase in the minimum price threshold effectively

(b) The Purported Lack of Right to a Prompt Sale of Assets

Brian claims the trial court erred in stating it was appointing a receiver " 'to preserve Drake's right to a prompt sale of the Company,' " because the Term Sheet created no such right—the Term Sheet instead imposed a process around any such sale, including a minimum price and a deadline for completion, and the appointment of a third director if a sale could not be accomplished within the agreed upon time frame. Brian's selective quotation of the order misrepresents the trial court's reasoning as well as the scope of its order.

The trial court's order elsewhere acknowledges the other sale-related terms of the Term Sheet, and states that Brian's actions "warrant[ ] appointment of a receiver to pursue the sale of the Company in compliance with the parties' contractual obligations under the Term Sheet." In that Term Sheet, Drake and Brian agreed to sell all assets of the Companies, that the sale process would commence forthwith, and that they would cooperate in good faith and approve the best offer for the Companies' assets provided the offer was over a certain amount. The parties included a target date for completion of the sale, and provided it could be extended. The trial court circumscribed the relief awarded to selling the Companies' assets "per the Term Sheet," extended the sale deadline as set forth above, and ordered

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rewrites the Term Sheet by imposing a lower minimum price given the time value of money fails for similar reasons. Brian agreed to the extension without seeking a corresponding change in the price threshold, and in any event he is equitably estopped from raising such a complaint given that he was the cause of the delay.

that "the Receiver may only sell the Subject Properties if the minimum price threshold [in the parties' agreement] is met." In short, the court did not vary but adhered to the terms of the Term Sheet regarding asset sales.

(c) The Purported Requirement to Use Alternative Remedies Set Forth in the Term Sheet

Brian finally argues the parties bargained for certain remedies should either side breach the Term Sheet, such as arbitration, and those bargained for remedies did not include the appointment of a receiver. In light of these contractually specified remedies, Brian asserts the trial court could not vary the Term Sheet by appointing a receiver.

Section 564 contains no prerequisite the parties contractually agree before a court may consider a receivership request. In the absence of any such statutory directive, we decline to impose such a requirement, as it runs counter to the purposes of the receivership statute and remedy and would unduly limit that remedy when it would otherwise be appropriate. In any event, the contractual language made clear the remedies in the Term Sheet were not exclusive and did not preclude Drake's request for a receiver. The Term Sheet states "Except as otherwise expressly provided herein, any and all remedies herein expressly conferred upon a Party hereunder shall be deemed cumulative with and not exclusive of any other remedy conferred hereby or by law on such party, and the exercise of any one remedy shall not preclude the exercise of any other."

2. The Court Did Not Abuse Its Discretion in Rejecting Alternative Remedies

The trial court recognized a receivership is a drastic remedy to be utilized only in exceptional circumstances. In determining whether a receiver is appropriate, a trial court must consider the availability and efficacy of other remedies. (*Gold v. Gold*, *supra*, 114 Cal.App.4th at p. 807.) Brian claims the trial court abused its discretion in determining other remedies would not be effective, namely arbitration, installing a provisional director, ordering specific performance, or entering an injunction.

The trial court acted within its discretion in rejecting these alternatives. The receivership remedy imposed by the court was limited—it extended only to the sale of the Companies' assets, and not (as Drake requested) to the day-to-day management of the Companies. While Brian suggests appointing a receiver will impact the value the Companies may realize for their assets, the trial court found a receiver was unlikely to diminish the sale value given that the deadlock and dysfunction at the Companies was already known to the market. This was a reasonable conclusion supported by substantial evidence.

With regard to potential alternative remedies, the parties tried arbitration, and it failed because among other things Brian disregarded Judge Tevrizian's orders. The trial court was not required to try repeating what had already failed. Similarly, with regard to the provisional director alternative, the court expressly noted the parties had "tried the remedy of a provisional director, and that did not work because Brian controls management," and Brian had exhibited "not just a failure to cooperate, but . . . real intransigence, which could not be

overcome by a provisional director." In light of Brian's track record of defiance in reaction to board oversight, and Judge Tevrizian's resignation as a result of that insubordination, it was reasonable for the trial court to reject this option as futile.

The trial court was similarly within its discretion in determining an order for specific performance or an injunction would be ineffective. Brian was in control of the Companies, repeatedly acted in ways to flout the sale process, and nevertheless continued to insist his actions were appropriate and necessary. Given Brian's intransigence, the trial court did not abuse its discretion in concluding an order telling Brian to comply with the terms of the Term Sheet would not be effective.[7]

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[7] Brian also argues for the first time in his reply brief that damages would compensate Drake for any loss and provided an appropriate alternative remedy that made appointment of a receiver unnecessary. " ' "Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." ' " (*Alcazar v. Los Angeles Unified School Dist.* (2018) 29 Cal.App.5th 86, 100, fn. 5.) Brian offers no explanation for his failure to raise this argument in his opening brief, and we therefore do not consider it. In any event, given the age and health of the parties, it was not an abuse of discretion for the trial court to reject the efficacy of a money damage award years in the future to remedy a settlement agreement after prior litigation requiring a prompt asset liquidation, particularly where there was a potential buyer at the time of the receivership request.

B. The Nominal Defendants Were Not Entitled to Litigate the Merits of the Receivership Request Ultimately Granted by the Court

1. Standard of Review

Determinations of jurisdiction and alleged denial of due process are each reviewed de novo. (*Dorel Industries, Inc. v. Superior Court* (2005) 134 Cal.App.4th 1267, 1273 ["When the jurisdictional facts are not in dispute, the question of whether the defendant is subject to personal jurisdiction is purely a legal question that we review de novo."]; *Mednik v. State Dept. of Health Care Services* (2009) 175 Cal.App.4th 631, 639 [appellate consideration of duty to comport with due process "requires us to address the purely legal questions of the process due and whether [the party] received such process"].)

2. The Relief Sought Did Not Threaten Any Legitimate Interest of the Nominal Defendants

Drake brought this action individually and derivatively on behalf of the corporate entities. The complaint was served on Brian's counsel the same day it was filed, October 22, 2018. Given Brian's role in management, the corporate entities were thus aware of the lawsuit. That being said, despite being named as nominal defendants, the corporate entities were not served until November 27, 2018. Later that same day (November 27, 2018), the court issued the receivership order.

If the corporate entities had a right to be heard at the November 27, 2018 hearing in this derivative action, serving them at the hearing at which the receivership order was entered would not comport with due process. (E.g., *Koshak v. Malek* (2011) 200 Cal.App.4th 1540, 1548 ["the United States Supreme

Court has confirmed consistently that prejudgment orders affecting a party's rights in property entered without notice and an opportunity to be heard violate due process requirements"].) Brian claims the nominal defendants had such a right, and due process required they receive notice sufficient to afford an opportunity to present evidence, objections and argument. The nominal defendants join in these arguments.

(*a*) *Brian Lacks Standing to Raise the Issue of Notice to the Nominal Defendants*

Brian lacks standing to claim a due process error on behalf of the nominal defendants. A party does not have standing on appeal to urge an error that did not affect his own rights. (*In Re J.T.* (2011) 195 Cal.App.4th 707, 717.) To the extent the nominal defendants did not receive due process, it was the nominal defendants and not Brian that was wronged. "Injurious effect *on another party* is insufficient to give rise to appellate standing." (*Conservatorship of Gregory D.* (2013) 214 Cal.App.4th 62, 67.) Brian received adequate notice and an opportunity to be heard before the trial court ruled, and his own rights were not affected by the alleged lack of notice to another party.

(b) *The Nominal Defendants Were Not Entitled to Defend Against the Receivership Order Granted by the Court*

As for the nominal defendants themselves, a nominal defendant generally cannot defend a derivative action brought on its behalf. The nominal defendants here had no right—in a dispute between two equal shareholders—to take a position in favor of one shareholder and adverse to the other, simply because one of the shareholders had management control and the board

could not exercise any management oversight because its only representatives were the two warring shareholders. Because of their limited role in a derivative action, service upon the nominal defendants shortly before the receivership order did not violate any due process right owed to those nominal defendants.[8]

"A derivative suit is a suit brought on behalf of a corporation for injury to the corporation . . . ." (*Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 297.) "An action is deemed derivative ' "if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets." ' [Citation.] When a derivative action is successful, the corporation is the only party that benefits from any recovery; the shareholders derive no benefit ' "except the indirect benefit resulting from a realization upon the corporation's assets." ' [Citation.]" (*Grosset v. Wenaas*

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[8] At oral argument, counsel for the nominal defendants additionally argued service of the receivership request was infirm because it did not comply with statutory notice provisions. "We do not consider arguments that are raised for the first time at oral argument." (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1554, fn. 9.) Even if this argument had been properly presented, it would not change the result. Given that the nominal defendants did not have a right to defend on the merits of the receivership request as granted by the court, remand to comply with the statutory notice provisions applicable to the initial ex parte application would be an idle act because at the end of the notice period, the nominal defendants still could not take a position on the merits, and the matter would be postured no differently than it is now.

(2008) 42 Cal.4th 1100, 1108.) Accordingly, the nominal corporate defendant in a derivative action is not a defendant as that term is commonly understood. "The complaint in a derivative action is filed on the corporation's behalf; not against it. [Citation.] . . . The only reason the corporation is named a nominal defendant is its refusal to join the action as a plaintiff." (*Patrick v. Alacer Corp*. (2008) 167 Cal.App.4th 995, 1004 (*Patrick*).)

For these reasons, while a nominal defendant is a necessary party given the nature of the relief sought in a derivative action, "a nominal defendant corporation generally may not defend a derivative action filed on its behalf. The corporation may assert defenses contesting the plaintiff's right or decision to bring suit, such as asserting the shareholder plaintiff's lack of standing or the [special litigation committee] defense. (Corp. Code, § 800, subd. (b)(1); [citation].) . . . [T]he corporation has no ground to challenge the merits of a derivative claim filed on its behalf and from which it stands to benefit." (*Patrick*, *supra*, 167 Cal.App.4th at p. 1005.)[9]

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[9] Brian asserts *Horowitz v. 148 South Emerson Associates, LLC* (2d Cir. 2018) 888 F.3d 12 stands for the proposition that a 50 percent owner has a right to assert arguments on the nominal defendants' behalf. Putting aside that *Horowitz* involves New York and not California law, the case does not support Brian's position but rather illustrates the principle that a shareholder cannot use corporate control to advantage himself in a derivative action. In *Horowitz*, one LLC sued another LLC. The court permitted one 50 percent member of the defendant LLC to defend that lawsuit because unless he was permitted to do so, the inequitable result would be that the defendant LLC would

In this case, no special litigation committee was appointed to evaluate whether prosecution of the derivative action was in the best interests of the Companies, nor could one have been formed as there was no disinterested and independent director available. Nor was Drake's standing to bring the action challenged.[10] We therefore apply " 'the general rule for corporate participation in a derivative action [which] is that "[u]nless the derivative action threatens rather than advances corporate interests, [the corporation] cannot participate in the defense on the merits." ' [Citation.] 'Because the claims asserted and the relief sought in [the derivative] complaint would, if proven, advance rather than threaten the interests of the nominal defendants, the nominal defendants must remain neutral in [the] action.' [Citation.]" (*Patrick*, *supra*, 167 Cal.App.4th at p. 1007.)

One of the practical and ethical reasons for this rule is that in a typical derivative action, the alleged wrongdoers (as is the case here) are in control of the corporation. (*Patrick*, *supra*, 167 Cal.App.4th at p. 1006.) While Brian asserts he and the nominal

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default and the case would resolve in favor of one 50 percent member at the expense of the other 50 percent member regardless of the merit of the claims asserted. (*Id.* at pp. 19-22.) Here, in contrast, the dispute is between two shareholders, both capable of defending themselves without risk of default, and the inequitable result would be to permit one shareholder to use his control of the corporation to advantage himself in the lawsuit by allowing the nominal defendant to defend on the merits.

[10] It is undisputed Drake is a shareholder. Before the trial court, Brian did challenge Drake's standing to seek a receiver based on Drake having lost the original certificate for his shares. The trial court rejected the claim, noting it was not a serious issue, and Brian does not pursue this argument on appeal.

defendants were aggrieved because the trial court denied Brian the right to hire counsel to represent the Companies, " '[a]llowing the nominal [corporate] defendants to defend on the merits in effect would allow [the individual defendant] to shift the cost of his defense of the derivative suit to the corporations against which he has allegedly committed tortious conduct. . . . [The individual defendant's] using his control of the nominal defendants to get them to defend on the merits would shift the cost of his defense to the corporations even if [the shareholder plaintiff's] claims are proven.' [Citation.]" (*Id*. at p. 1007.) Who pays the fees for corporate counsel is not dispositive of whether the nominal defendants can defend on the merits. The trial court, however, rightly raised the concern that Brian would improperly use corporate funds to advance Brian's interests when finding the nominal defendants were required to remain neutral and that Brian could not use corporate funds to retain counsel to appeal the receivership order.

The *Patrick* court noted in dicta that circumstances might exist (not present in that case) where a corporation ceases to be a nominal defendant and becomes an actual party defendant able to defend on the merits, and gave examples including " 'an action to enjoin the performance of a contract by the corporation, to appoint a receiver, to interfere with a corporate reorganization . . .' or other situations where the corporation has 'interests adverse to those of the nominal plaintiffs bringing the action derivatively.' " (167 Cal.App.4th at pp. 1006—1007.) Although we need not and do not reach the issue, had Drake's request for a receiver to run the day-to-day operations of the business been granted, the nominal defendants may have had sufficient adversity that the service here would create a due process issue.

But given the more limited order actually entered, the nominal defendants were required to remain neutral. Well before this lawsuit and the receivership request, each of the nominal defendants' shareholders signed a binding agreement to sell the Companies' assets and dissolve the Companies. One 50 percent shareholder asserted the other 50 percent shareholder violated that agreement; the other 50 percent shareholder disagreed. In these circumstances, the nominal defendant is not permitted to tip the scales in favor of one shareholder over another. A dispute between the shareholders over the Term Sheet, which requires the Companies' presence as nominal defendants so relief can be ordered, does not independently threaten the interest of the nominal defendants or permit them to defend the action on the merits.

Only aggrieved parties may appeal, meaning one whose rights or interests are injuriously affected by the order or judgment. (§ 902; *Comerica Bank v. Runyon* (2017) 16 Cal.App.5th 473, 479.) Because the nominal defendants do not have the right to take litigation positions regarding the order entered below, they lack standing to advance the arguments they seek to assert on appeal. Because the nominal defendants lack standing, we dismiss their appeal.

C. The Trial Court's Evidentiary Rulings Were Not an Abuse of Discretion

1. Standard of Review

A trial court's evidentiary rulings are reviewed for an abuse of discretion. (*Major v. R.J. Reynolds Tobacco Co.* (2017) 14 Cal.App.5th 1179, 1202.) Even if the admission of certain evidence was erroneous, reversal results only if the "errors

complained of resulted in a miscarriage of justice." (Evid. Code, § 353, subdivision (b); see also *Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 447 [appellants must "show that it is reasonably probable that they would have received a more favorable result . . . had the error not occurred"].)

2. Judge Tevrizian's Declaration

Brian argues Evidence Code sections 703.5 and 1121 prohibited consideration of Judge Tevrizian's declaration in its entirety, and the trial court committed reversible error by admitting portions of the declaration. Section 703.5 prohibits arbitrators and mediators from testifying "as to any statement, conduct, decision, or ruling, occurring at or in conjunction with" an arbitration or mediation "in any subsequent civil proceeding," subject to certain exceptions not applicable here. Section 1121 prohibits mediators or anyone else from submitting to a court, and a court from considering, "any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator," again subject to exceptions not applicable here.

"[P]rivileges are narrowly construed so as to keep them within the limits of the statutes . . . ." (*Saeta v. Superior Court* (2004) 117 Cal.App.4th 261, 272 [refusing to exclude statements beyond those expressly covered by Evidence Code section 703.5].) In this matter, Judge Tevrizian served three roles. He was initially a mediator, and helped the parties reach the Term Sheet. He then arbitrated disputes arising under the Term Sheet and served as an independent director. The trial court overruled Brian's objection to the entire Tevrizian declaration, and instead parsed it—sustaining more specific objections as to certain

portions (as well as sua sponte striking portions to which Brian did not specifically object) that discussed Judge Tevrizian's role as a mediator/arbitrator. The court expressly noted it was receiving the remaining portions because they related to Judge Tevrizian's role as a company director.

In its ruling, the court struck those portions of the declaration concerning the mediation, and therefore did not admit any evidence in violation of Evidence Code section 1121.[11] With regard to Evidence Code section 703.5, Brian argues that because Judge Tevrizian was empowered to arbitrate disputes, which the parties continued to have after execution of the Term Sheet, Tevrizian's role as an independent board member was so inextricably intertwined with his arbitral role that none of his testimony was admissible. We reject this argument. In the facts presented to the trial court, the roles of an arbitrator and director were distinct and capable of being parsed. Because these roles could be separated, all of Judge Tevrizian's board-related communications were not cloaked in privilege and the trial court did not abuse its discretion in the lines it drew between the two roles. Indeed, Brian elsewhere distinguishes between Judge

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[11] While Brian insists Judge Tevrizian never stopped acting as a mediator, mediation "is essentially a process where a neutral third party who has no authoritative decisionmaking power intervenes in a dispute to help the disputants voluntarily reach their own mutually acceptable agreement." (*Travelers Casualty & Surety Co. v. Superior Court* (2005) 126 Cal.App.4th 1131, 1139.) Following the mediation, the parties agreed in the Term Sheet that Judge Tevrizian would serve as an arbitrator and a director—in other words, someone with authoritative decision-making power—and he was thus no longer acting as a mediator subject to Evidence Code section 1121.

Tevrizian's arbitrator and director roles and offered his own evidence about Tevrizian's actions as a board member. Brian's line drawing between these two roles in terms of the evidence he offered largely mirrors the line drawn in the court's evidentiary rulings.

In any event, even if Brian could establish error, we see no miscarriage of justice warranting reversal. Brian identifies no critical fact that came singularly from Judge Tevrizian. The record instead demonstrates the facts the trial court admitted from the Tevrizian declaration were repeated by other declarants, a fact the trial court recognized when commenting on the evidence.

3. The Admission of Reply Evidence

Brian also asserts the trial court abused its discretion in considering supplemental declarations submitted with Drake's reply papers. "The general rule of motion practice . . . is that new evidence is not permitted with reply papers." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537.) However, a court can consider evidence supplemental to that submitted in the moving papers. (*Ibid.*) Here, the court found the reply evidence did not raise new issues, but rather was responsive to claims made in opposition.

We need not address whether the trial court's consideration of these declarations was error, because we do not see any prejudice, much less a miscarriage of justice, from the admission of the evidence submitted with the reply brief. The majority of the purportedly new facts Brian identifies as improperly admitted relate to his alleged mismanagement of the Companies resulting in business loss and waste. This evidence related to the

request a receiver be appointed to run the day-to-day operations of the business to halt such alleged mismanagement and waste, a request the trial court decided in Brian's favor and denied. The remainder did not raise new issues but largely responded to Brian's evidence by reiterating or amplifying points already made in the declarations that accompanied Drake's moving papers.

V. DISPOSITION

The December 7, 2018 order appointing receiver for sale process and granting injunction is affirmed. The nominal defendants' appeal is dismissed. Drake is to recover his costs on appeal from Brian.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

JOHNSON, Acting P. J.

BENDIX, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.